

STATE OF MICHIGAN
COURT OF APPEALS

SALLY BELL-MATHIAS,

Plaintiff-Appellant,

v

ANR PIPELINE COMPANY, RON MEREDITH,
and JAMES PESTA,

Defendants-Appellees.

UNPUBLISHED

August 7, 2003

No. 237049

Mecosta Circuit Court

LC No. 99-013618-CL

Before: Smolenski, P.J., and Cooper and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendants. We affirm.

Plaintiff began her employment with defendant ANR Pipeline Company (defendant) in 1979, as a secretary and ultimately was promoted to the position of drilling coordinator. Following the closure of plaintiff's place of employment, plaintiff was transferred to another facility in Big Rapids. Plaintiff alleged that a drilling superintendent made a comment to her, in the presence of two other males, that the field was no place for a woman. An investigation into the complaint did not result in any discipline. The drilling superintendent and the two witnesses denied that the statement was ever made. Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC), alleging that she was discriminated against based on her gender and retaliated against for complaining to her supervisor about the gender discrimination. Following an investigation, the EEOC dismissed the charges.

In June 1998, plaintiff injured her back while performing gas sampling duties. Plaintiff was allowed to return to work with the restriction that she not lift weights greater than ten pounds. Despite this restriction, plaintiff reinjured her back following her return to work. Consequently, defendant's human resources representative sent a letter to plaintiff advising her of the need to submit the application for long-term disability benefits or information regarding plaintiff's medical condition or release from work restrictions. Despite repeated requests for this information, plaintiff submitted a letter, without any medical documentation, indicating her desire to return to work. After plaintiff did not appropriately respond to the correspondence, plaintiff was terminated from defendant's employ. Plaintiff filed this litigation alleging that the corporate defendant and two corporate employees engaged in gender discrimination in violation of the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq*, and disability discrimination in violation of the Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq*.

Plaintiff premised her claims based on the “women in the field” comment and the benefits, including training, overtime, and company vehicles, provided to male co-workers. The trial court granted defendants’ motion for summary disposition.

Plaintiff first alleges that the trial court erred in dismissing her retaliation claim when she presented direct evidence in support of her claim. We disagree. An appellate court reviews the grant or denial of a motion for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The moving party has the initial burden to support its claim to summary disposition by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate that a genuine issue of disputed fact exists for trial. *Id.* To meet this burden, the nonmoving party must present documentary evidence establishing the existence of a material fact, and the motion is properly granted if this burden is not satisfied. *Id.* Affidavits, depositions, and documentary evidence offered in opposition to a motion shall be considered only to the extent that the content or substance would be admissible as evidence. MCR 2.116(G)(6); *Maiden, supra*.

Direct and circumstantial evidence may be utilized to prove intentional discrimination. *DeBrow v Century 21 Great Lakes, Inc*, 463 Mich 534, 539; 620 NW2d 836 (2001). When direct evidence is offered to prove discrimination, the shifting burden test does not apply. *Id.* at 540. Rather, the plaintiff bears the burden of persuading the trier of fact that the employer acted with illegal discriminatory animus. *Harrison v Olde Financial Corp*, 225 Mich App 601, 612; 572 NW2d 679 (1997). Further, the plaintiff must establish evidence of the plaintiff’s qualification or eligibility and direct proof that the discriminatory animus was causally related to the decision maker’s action. *Id.* at 613. Upon submission of proofs, the defendant may not avoid a trial by articulating a nondiscriminatory reason for its action. Rather, the presentation of direct evidence is generally sufficient to submit the plaintiff’s case to the jury. *Id.* Direct evidence is evidence that, if believed, requires the conclusion that unlawful discrimination was, at least, a motivating factor. *Id.*

Plaintiff alleges that direct evidence of discrimination was established by the “women in the field” comment made by a drilling superintendent. This remark does not meet plaintiff’s burden of presenting admissible evidence in opposition to defendants’ motion for summary disposition. To determine the admissibility of a stray remark, the court must examine: (1) whether the proffered comment was made by an agent of the employer involved in the decision to terminate; (2) whether the statements made related to the decision making process; (3) whether the statements were vague, ambiguous, or isolated remarks; and (4) whether the statements or comment were proximate in time to the termination. *Krohn v Sedgwick James of Michigan, Inc*, 244 Mich App 289, 298-300; 624 NW2d 212 (2001). Once the proffered remark is determined to have some bearing on the employer’s motivation, the probative value of the remark must be balanced in light of the potential or risk of unfair prejudice. *Id.* at 302-303. An inflammatory remark may be extremely prejudicial to the defense where the jury might attribute a comment by an agent, unauthorized to make adverse employment decisions, to the employer. *Id.* at 303.

The statement regarding gender was isolated; plaintiff did not identify any other comments made by male coworkers. Additionally, there is no evidence to indicate that the

statement made related to the decision making process, and the statement was not proximate in time to the termination. Additionally, the comment, albeit by an employee of the corporate defendant, was not made by an individual authorized to make adverse employment decisions. *Krohn, supra*. Plaintiff did not present admissible documentary evidence, *Maiden, supra*, of direct discrimination.

Plaintiff also failed to present evidence to support a retaliation claim based on the shifting burden test. The retaliation provision of the CRA, MCL 37.2701(a) requires that the plaintiff prove: (1) he engaged in a protected activity; (2) this was known by the defendant; (3) the defendant took employment action adverse to the plaintiff; and (4) there was a causal connection between the protected activity and the adverse employment action. *Barrett v Kirtland Community College*, 245 Mich App 306, 315; 628 NW2d 63 (2001). To satisfy the causation requirement, the plaintiff must show that the participation in activity protected by the CRA was a “significant factor” in the employer’s adverse employment action, not merely a causal link between the two. *Id.* Additionally, the shifting burden framework applies to retaliatory discharge actions filed pursuant to the CRA. *Roulston v Tendercare, Inc*, 239 Mich App 270, 280-281; 608 NW2d 525 (2000). Therefore, the plaintiff bears the initial burden of establishing a prima facie case of retaliatory discharge. *Id.* If the plaintiff meets this burden, the defendant must then articulate a legitimate business reason for the discharge. *Id.* If the defendant meets this burden, plaintiff must demonstrate that the legitimate reason offered by the defendant was not the true reason, but a pretext for discharge. *Id.*

Plaintiff failed to establish a prima facie case of retaliatory discharge because there was no evidence of a causal connection between her engagement in protected activity and the adverse employment action. Aside from the women in the field comment, plaintiff alleged that she was denied training, overtime, and other benefits given to male coworkers. However, plaintiff did not present any admissible evidence regarding the training, overtime, and other benefits given to male coworkers, but merely presented plaintiff’s subjective opinion. Plaintiff’s subjective opinion is insufficient to meet her burden of proof in opposition to defendants’ motion for summary disposition. *Marsh v Dep’t of Civil Service (After Remand)*, 173 Mich App 72, 81; 433 NW2d 820 (1988). Accordingly, the trial court properly granted summary disposition of the retaliation claim.

Plaintiff next alleges that the trial court erred in dismissing her claim of perceived disability pursuant to the PWDCRA. We disagree. To establish a prima facie case of discrimination under the statute, the plaintiff must demonstrate: (1) that he or she is “disabled” as defined by the statute; (2) the disability is unrelated to the plaintiff’s ability to perform the duties of a particular job; and (3) the plaintiff has been discriminated against in one of the ways set forth in the statute. *Chiles v Machine Shop, Inc*, 238 Mich App 462, 473; 606 NW2d 398 (1999). To succeed on a claim of perceived disability, the plaintiff must present evidence that the employer regarded the plaintiff as having an impairment that substantially limited a major life activity. *Id.* at 475. A major life activity includes “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.” *Id.* at 477. In the present case, plaintiff failed to present evidence that defendant viewed the plaintiff as having an impairment that substantially limited a major life activity. Rather, defendant notified plaintiff of the procedure for return to work in light of her reinjury despite following work restrictions or the procedure to qualify for long-term disability. Plaintiff did not

comply with this procedure or present medical documentation, but merely subjectively asserted in a letter to defendant that she could return to work. Accordingly, the trial court properly granted defendants' motion for summary disposition of the claim pursuant to PWDCRA.¹

Affirmed.

/s/ Michael R. Smolenski

/s/ Jessica R. Cooper

/s/ Karen M. Fort Hood

¹ Based on our conclusion that plaintiff failed to meet her burden of proof with admissible documentary evidence in support of her claims, we need not address the propriety of the inclusion of the individually named defendants and the trial court's dismissal pursuant to MCR 2.116(C)(8) of the PWDCRA claim. The trial court also granted summary disposition of the PWDCRA claim pursuant to MCR 2.116(C)(10), and that disposition was proper.